

In the Matter of)
)
)
 Petition to Establish Procedural) WC Docket No. 07-267
 Requirements to Govern Proceedings for)
 Forbearance Under Section 10 of the)
 Communications Act of 1934, As Amended)
)

Balanced and minimal telecommunications regulations that reflect today's increasingly competitive marketplace are essential to economic efficiency and consumer welfare. Where emerging technologies and services create newly competitive marketplace environments, regulatory treatment of such markets should be deregulatory in emphasis absent compelling circumstances. The Commission should follow the letter of the law set down by Congress for forbearance petitions. Accordingly, it should *not* adopt rules that would place burden of proof or *prima facie* case requirements on forbearance petitioners. Similarly, the Commission should *not* adopt rules allowing it to revisit previously "deemed granted" petitions to issue orders on such petitions. Finally, because the plain terms of law passed by Congress commands the Commission to forbear from regulation in certain circumstances, the Commission's question about whether that policy has furthered Congressional purposes is an inapt question. Congressional purpose is set out in law, and the Commission should not second-guess Congress's policy choices.

STATEMENT OF INTEREST

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, individual membership organization of state legislators. ALEC's mission is to promote the Jeffersonian principles of individual liberty, limited government, federalism, and free markets.

To guide policymakers through the uncharted waters of the 21st Century economy, ALEC's Telecommunications and Information Technology Task Force brings together state legislators, industry representatives, and public policy experts. Working together, the Task Force seeks to develop state public policy that will preserve free-market principles, promote competitive federalism, uphold deregulation efforts, and keep the communications and technology industries free from new burdensome regulations.

ALEC's Telecommunications and Information Technology Task Force has consistently supported technological neutral, non-discriminatory government regulation of public rights-of-ways. In 2004, the Task Force adopted "A Resolution Regarding the Regulation of Intrastate Telecommunications Services in Healthy and Sustainable Competitive Environments." Therein, the Task Force resolved its support of "minimal, competitively neutral state and federal regulation of all telecommunications providers, including incumbent and competitive wireline carriers, wireless carriers and cable telephony providers." The Task Force also resolved its support for "balanced and minimal telecommunications regulations that more accurately reflect today's competitive situation in a particular marketplace."

I. THE COMMISSION CANNOT LAWFULLY ADOPT A LAW PLACING BURDEN OF PROOF AND *PRIMA FACIE* CASE REQUIREMENTS ON FORBEARANCE PETITIONERS

The Commission should *not* adopt rules placing burden of proof or *prima facie* case requirements on forbearance petitioners. When considering a forbearance petition, the plain terms of Section 10 of the Communications Act, amended, requires the Commission to forbear from applying regulations unless it finds certain requirements are met.¹ All such petitions are automatically deemed granted by Congress unless the Commission determines within the statutory time period that the petition fails to meet those requirements.² Section 10's plain terms places the burden on the Commission. To

¹ 47 U.S.C. § 160(c), which governs forbearance petitions, requires the Commission to use the criterion set out in § 160(a):

the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

² 47 U.S.C. § 160(c) states:

Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

require forbearance petitioners to bear the burden of proving that the requirements (individually or corporately) are met is inconsistent with the letter of the law. Similarly, to require such petitioners to establish a *prima facie* case that the requirements of Section 10 are met lest the petition be dismissed outright is contrary to clear statutory mandates. Congressional statute fixes the burden with the Commission, and no regulatory authority exists for the Commission to shift that burden away through administrative rulemaking.

II. THE COMMISSION CANNOT LAWFULLY ADOPT A RULE ALLOWING IT TO REVISIT AND ISSUE ORDERS ON “DEEMED GRANTED” PETITIONS

The Commission should *not* adopt rules for revisiting previously “deemed granted” petitions. Congress set clearly-defined statutory deadlines for the Commission in Section 10.³ Statutory time periods provide procedural certainty and finality. Section 10 does *not* delegate the Commission authority to revisit forbearance petitions that it has previously granted or that have been “deemed granted.” Any rules adopted by the Commission to allow it to revisit such petitions after the statutory deadlines would subvert Section 10’s plain terms. Statutory time periods and deadlines would be rendered meaningless if administrative rulemaking were permitted to retroactively undo decisions mandated by Congress. Absent the Commission’s denial of forbearance petitions, they are “deemed granted” by Congress.⁴ Commission rulemaking cannot supersede Congressional decision-making expressed in statute.⁵

³ 47 U.S.C. § 160(c).

⁴ *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C.Cir.2007)(“In those instances in which the Commission does not deny a forbearance petition, Congress has spelled out the legal effect: the petition ‘shall be deemed granted’”(quoting 47 U.S.C. § 160(c)).

III. THE COMMISSION SHOULD NOT SECOND-GUESS CONGRESSIONAL PURPOSES EMBODIED IN FEDERAL STATUTES

The Commission's question about "whether forbearance is being utilized for the purposes intended by Congress" is not an appropriate for a formal answer by the Commission.⁶ Congress's purposes and intentions are set out in Section 10. Presumably, the statute is effectuating its purposes by virtue of its application and enforcement. Whether the forbearance policies Congress set out in Section 10 are not being utilized to achieve their own underlying purposes is a question best left to Congress.

As already stated to the Commission in this proceeding:

Congress created forbearances as a deregulatory mechanism and, as a result, whenever the Commission declines to enforce a regulation as a result of forbearance in the public interest, it is essentially axiomatic that the provision is being used as intended.⁷

The question presented appears hedged to invite subjective second-guessing of Congress's intentions and purposes in enacting Section 10. But Congress's purposes are set out in the statute, and those purposes should not otherwise be second-guessed. The Commission should refrain from offering any official answer to this question in any forthcoming rulemaking.

⁵ See, e.g., *Sprint Nextel Corp. v. FCC*, 508 F.3d at 1132 ("When the Commission failed to deny Verizon's forbearance petition within the statutory period, Congress's decision-not the agency's-took effect.")

⁶ *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, *Notice of Proposed Rulemaking*, FCC 07-202 (Nov. 30, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-202A1.pdf at para. 13.

⁷ *Comments of the Mercatus Center*, WC Docket No. 07-267 (March 7, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519864580, at 3.

CONCLUSION

The Commission should *not* adopt rules to place burden of proof or *prima facie* case requirements on forbearance petitioners. Nor should the Commission adopt rules allowing it to revisit and rule on petitions already “deemed granted.” Finally, the Commission decline to answer questions that likely involve second-guessing of Congress’s purposes in enacting forbearance requirements in law.

Respectfully submitted,

Seth Cooper

Director,
Telecommunications &
Information Technology Task Force
American Legislative Exchange Council

1101 Vermont Ave NW, 11th Floor
Washington D.C., 20005
(202) 742-8524

March 18, 2008